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In the Supreme Court of the United States

OCTOBER TERM, 1983

JACK WALTERS & SONS CORPORATION,

Petitioner,

vs.

MORTON BUILDINGS, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a franchisor's tie of the use of its trademark to the purchase of common construction materials used in its franchisees' manufacture of a trademarked building lawful under Section 1 of the Sherman Act if the trademark covers the finished building constructed by the franchisee, and the franchisor does not separately license its mark?

2. Is vertical price-fixing lawful under Section 1 of the Sherman Act if used by a franchisor to force its franchisees' adherence to maximum retail prices advertised directly by the franchisor to ultimate consumers?

3. Was the damage suffered by petitioner as a result of respondent's alleged price-fixing antitrust injury?

4. Where a franchisor has, in concert with third parties, imposed a regime of vertical restraints on its independent dealers, for the purpose and with the effect of eliminating the dealers as actual and potential competitors of the franchisor, is the aggregation of restraints reasonable for Section 1 purposes if the individual restraints considered in isolation are lawful?

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Petitioner Jack Walters & Sons Corporation, by its undersigned attorneys, hereby petitions the United States Supreme Court for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

Petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit in Appeal No. 83-2300, which has been published at 737 F.2d 698 (7th Cir. 1984). The opinion of the district court did not appear in any official or unofficial reporter.

GROUNDS FOR SUPREME COURT JURISDICTION

This Court has jurisdiction to grant the review sought by this petition pursuant to 28 U.S.C. § 1254(1), in that this petition seeks review by writ of certiorari of a decision rendered and judgment entered on June 22, 1984, by the United States Court of Appeals for the Seventh Circuit in a civil case. No request for rehearing or extension of time has been made.

PERTINENT STATUTE

15 U.S.C. § 1.

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

15 U.S.C.A. § 1, United States Code Annotated, p. 5 (1977).

STATEMENT OF THE CASE

Procedural Posture

This is a civil action under the antitrust laws of the United States. Petitioner seeks review of a decision by the United States Court of Appeals for the Seventh Circuit affirming the trial court's dismissal of three antitrust claims and one claim arising under Wisconsin common law.

The court of first instance was the United States District Court for the Eastern District of Wisconsin. That court had jurisdiction of petitioner's antitrust claims pursuant to 28 U.S.C. §§ 1331 and 1337, in that those claims arose under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, an Act of Congress regulating commerce. It had jurisdiction of petitioner's state law claim pursuant to 28 U.S.C. § 1332(a)(1), in that the adverse parties were

citizens of different states and the amount in controversy exceeded $10,000.

Petitioner sued respondent under Section 1 for allegedly tying the right to use respondent's trademark to the purchase from respondent of common materials and components used in constructing the product covered by that trademark; imposing and enforcing a regime of maximum resale prices; enforcing a regime of unlawful territorial restraints; and imposing an aggregation of vertical restraints for the purpose of absorbing petitioner's business and destroying petitioner as an actual and potential competitor of respondent. Petitioner also sued respondent under state law for alleged violation of a claimed duty of good faith and fair dealing arising out of the relationship between the parties.

Respondent moved for summary judgment and the parties submitted evidentiary materials totalling several thousand pages in support of and in opposition to the motion. The trial court referred the case to a Milwaukee attorney, designated as a special master. The special master recommended in a 50-page report that respondent's motion be granted with respect to the state law claim and with respect to three of the four antitrust claims. The district court adopted this recommendation in a two-page decision and order, making no independent findings or conclusions. On this basis, petitioner's typing, resale price-fixing, and aggregation of restraints claims were dismissed, as was petitioner's state law claim. Petitioner's territorial restraint claim and respondent's counterclaim for trademark infringement were retained for trial.

Upon its determination that there was no just cause for delay and that final judgment as to the dismissed claims should be entered, the district court directed entry of such judgment pursuant to Rule 54(b), Fed. R. Civ. Proc. Peti-

itoner appealed the resulting adverse judgment. In a decision and judgment dated June 22, 1984, the United States Court of Appeals for the Seventh Circuit affirmed the judgment in all respects.

Petitioner seeks review of the Court of Appeals' decision.

Pertinent Facts

In opposition to respondent's summary judgment motion in the trial court, petitioner Jack Walters & Sons Corporation ("Walters") submitted evidentiary material tending to prove the following facts:

Respondent Morton Buildings, Inc. ("Morton") is the dominant firm in the pole building industry.[1] A pole building is a utility structure, used primarily though not exclusively on farms. Its distinguishing feature is the use of a frame of treated, wooden posts individually set in concrete in place of a conventional, poured foundation. Once the superstructure has been built, the building is completed by nailing ribbed, sheet steel to the posts and adding windows, doors, and other accessories.

Morton began selling pole buildings in the late 1940's and early 1950's. Morton's pole building design is not patented or otherwise unique and can easily be duplicated.

In 1962, Walters sought and obtained the exclusive franchise to sell Morton Buildings in Wisconsin. During the period from 1966 to 1968, Morton appointed five other independent dealers in various Midwestern states. These dealers were responsible for selling Morton Buildings in their territories to individual farmers (and other cus-

[1] In 1977, for example, Morton accounted for 42% of sales of branded pole barns in the North Central region, i.e., the one which includes Wisconsin. Morton's total sales in that year amounted to more than $150 million, and Walters' sales of Morton Buildings in that year exceeded $6 million.

tomers) who wished to buy them. Morton itself also sold Morton Buildings directly to farmers through individual, company-owned sales offices. Through the efforts of its sales offices and dealers, Morton's trademark became the dominant and best known mark in the industry.

When Walters or another Morton dealer had completed a sale, it would place the corresponding order with Morton. Morton would then ship to the construction site one or more truckloads of building materials and components, such as sheet steel, nails and wood 2x4's, to be used in constructing the ordered building. These materials were delivered to the site on an open, flat-bed truck. The specific contents of the loads delivered by Morton varied over time, depending primarily on what Morton found it profitable to stock, and never included all materials or components needed in order to construct a Morton Building.

In the case of buildings sold by them, the dealers were responsible for taking the materials and components supplied by Morton, obtaining from other sources any components Morton was not including in its loads at the moment, and constructing the desired buildings from the ground up. The construction of each building was carried out by a crew hired and employed by the dealer, and typically required 160 hours or more of labor.[2]

Morton treated its independent dealers as franchisees and in fact frequently referred to them in that way. The dealers were required to sell only Morton Buildings, in territories established for them by Morton, at prices "suggested" by Morton. Morton closely regulated every

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[2] The photographs included in the appendix to this petition depict the construction process required to build a Morton Building, starting with the point at which the Morton components are delivered to the job site.

aspect of the independent dealers' businesses, from the training of construction crews to the way in which accounts were kept. Morton prescribed the design and appearance of the dealers' sales offices, which were required to conform to a distinctive configuration associated with the Morton name. Morton also regulated its dealers' use of the Morton name in advertising, promotional literature, signs, and so forth. Morton referred to this regime as the "Morton System".

Professor Willard Mueller, former chief economist for the FTC, concluded on the basis of his detailed examination of the Morton System that the relationship between Morton and its dealers was an "enterprise franchise", *i.e.*, a marketing arrangement in which franchisees operate a business enterprise according to a packaged business format, established by the franchisor and identified with the franchisor's trademark. Professor Mueller further classified this enterprise franchise as of the "manufacturing" type, *i.e.*, one in which the franchisees are charged with responsibility for producing the final product, in this case the Morton building, pursuant to plans and designs furnished by the franchisor.

A few of the components included in the Morton package (*e.g.*, roof trusses) were fabricated by Morton itself. Most of the components, however, were common-dimension lumber and similar items obtained by Morton from third-party suppliers, bearing the brands of the third-party suppliers or no brands at all, warehoused by Morton and shipped in response to particular orders. Thus, with respect to buildings constructed by its franchisees, Morton's economic function was primarily that of a supplier and warehouser of common construction materials.

Morton forbade its dealers to purchase from third-party suppliers materials or components which Morton chose

to provide itself even though there was no quality justification for this policy. (Indeed, in most instances the *same* materials were available from other sources.) Because of the nature of what it supplied, *i.e.*, readily available building materials which were less expensive on the open market, Morton had to develop elaborate policing procedures in order to enforce its purchasing restraints. Thus, Morton threatened to terminate dealers who violated these restraints, threatened to raise prices to dealers who complained about them, and procured the agreement of its third-party suppliers not to sell to Morton dealers.

In 1974, Morton made a conscious, corporate decision to transfer profitability from the retail to the wholesale level —that is, from the level at which Morton's company-owned sales offices and Morton's independent dealers operated, to the level at which Morton alone operated. It accomplished this by raising the prices at which its component package was sold to dealers (or book-charged to its own sales offices), while authorizing much lower increases in the price at which Morton Buildings could be sold to ultimate customers. Its purpose was the destruction of its remaining independent dealers. The result of this price squeeze was the elimination of Morton's remaining independent dealers, ultimately including Walters. It simply became economically ruinous for a dealer to sell and build Morton buildings. Faced with economic ruin, Walters began selling pole buildings under its own name, with lumber, nails and other components purchased from independent suppliers, and was as a result terminated by Morton as a Morton dealer. Walters alone among Morton's independent dealers survived to compete with Morton.

REASONS FOR GRANTING REVIEW

In its recent decision in *Jefferson Parish Hospital District No. 2* v. *Hyde*, ... U.S. ....., 104 S.Ct. 1551 (1984), this Court emphasized the preeminent role that empirical data and the economic understanding of that data must play in applying the legal rules which comprise the antitrust laws. In the decision challenged in this petition, the Court of Appeals scarcely paid even lip service to *Jefferson Parish Hospital,* and as a practical matter wholly disregarded the teaching of that decision.[3]

To the rigorous empiricism based on economic fact which informed this Court's decision in *Jefferson Parish Hospital,* the Court of Appeals has opposed a relentless dogmatism based on economic ideology. The decision at issue here is not, and except in the most superficial way does not purport to be, an analysis of the summary judgment record in a real world case or controversy. It does not respect existing legal authority. It is instead an academic exposition—a dissertation upon the merits of a particular thesis of economic policy. The thesis is that tying, and in particular trademark typing, is a disfavored antitrust theory, and, indeed, ought to be wholly discarded. The operating premise is that if facts—not to mention a

[3] A slip of the pen by the Court of Appeals is significant in suggesting the role *Jefferson Parish Hospital* actually played in the Court of Appeals' decision. The Court of Appeals noted parenthetically that *Jefferson Parish Hospital* was "decided after argument in our case". Decision at 6 (737 F.2d at 703). That is not correct. *Jefferson Parish Hospital* was decided the day before oral argument in the present case, and the decision was in fact discussed during oral argument. It was in addition the subject of supplemental memoranda submitted by the parties after oral argument.

competing economic analysis—get in the way of the thesis, so much the worse for the facts. The result is disregard of economic facts properly of record, in favor of three purported, bright-line, *per se* rules of legality:

(1) A trademark holder cannot be held liable for trademark tying under Section 1 of the Sherman Antitrust Act—regardless of the condition of or effect upon the relevant markets, the anticompetitive impact, the state of demand for the alleged tying and tied products or the nature of the economic relationships between the parties themselves or with respect to the product—if the trademark ultimately covers a product (even one manufactured by the franchisee) rather than a service, and if the trademark holder has not offered the trademark separately from the tied materials.

(2) A franchisor cannot be held liable under Section 1 for fixing maximum resale prices and for coercing adherence to the prices so fixed, if it does so in order to protect the credibility of price advertising directed by it to ultimate consumers.

(3) A franchisor, without regard to the amount of market power it enjoys, which has imposed upon and enforced against its independent dealers a complex aggregation of competitive restraints, has procured the active cooperation of third parties in enhancing the effectiveness of that enforcement effort, and has done so for the purpose of destroying its independent dealers as potential, independent competitors, cannot be held liable for this conduct under Section 1 of the Sherman Act beyond the extent to which the individual restraints would be unlawful if viewed in isolation.

These conclusions represent more than a series of conflicts with applicable individual decisions of this Court—although they certainly do represent that. They represent a systematic and implacable repudiation of a generation of antitrust development.

I.

THE COURT OF APPEALS' DECISION DISREGARDS THE APPROACH TO ANALYSIS OF TYING ISSUES PRESCRIBED BY THIS COURT IN JEFFERSON PARISH HOSPITAL.

Ever since the Ninth Circuit's landmark decision in *Siegel* v. *Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), it has been settled that a trademark can under appropriate circumstances be a separate product for purposes of a Section 1 tying claim. The most recent recognition of *Chicken Delight's* continuing authority was this Court's approving citation of it in *Jefferson Parish Hospital* itself. *See* 104 S.Ct. at 1563 n.35.

In the decision at issue here, the Seventh Circuit has created a gaping exception to this rule. In the case at bar, the Seventh Circuit held that petitioner's tying claim must be rejected as a matter of law because the Morton trademark and the construction materials tied to it were not "separate products". Decision at 10 (737 F.2d at 705-706). This was the case, the Court of Appeals said, because the Morton trademark covered a product rather than a service and such a trademark "is rarely licensed apart from the product—and was not in this case. . . ." *Id.* at 8 (737 F.2d at 704). Upon this basis, the Court of Appeals insisted that what it called "the separate-markets test of *Jefferson Parish* is not satisfied." *Id.*

This analysis reflects a radical misunderstanding of *Jefferson Parish Hospital*. In that decision, this Court specifically and emphatically rejected the suggestion that a seller's decision not to offer the packaged items separately means that the items cannot be separate products for tying purposes:

> The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations. . . . [T]he packages includes the services of the anesthesiologist. Petitioners argue that . . . they are merely providing a functionally integrated package of services. . . .
>
> Our cases indicate, however, that the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.

104 S.Ct. at 1561-62. This Court made it clear that the separate-market component of the tying analysis requires inquiry into whether "there is a sufficient demand for the purchase of anethesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services." 104 S.Ct. at 1563 (notes omitted). In examining this issue, this Court looked not at what the defendant hospital chose to offer but at what consumers sought to buy, pointing to testimony that "patients and their physicians frequently do differentiate between hospital services and anesthesiological services, and request specific anesthesiologists. . . ." 104 S.Ct. at 1564 n.36.

In the instant case, the summary judgment record included abundant evidence of requests, by Walters and others, to obtain the Morton trademark separately from

the "package" of materials—that is, to continue to build and sell pole buildings meeting the quality specifications and design configurations prescribed by Morton, while obtaining nails, lumber, Sakrete and similar generic, commonly-available items from original sources. The record also included evidence that competitors of Morton in the pole building industry did in fact offer trademarks separately. The record likewise contained abundant evidence of Morton's exploitation of its mark, through the Morton System, to obtain a distinct economic return over and above the value of the materials or components supplied by Morton. The record included finally the opinion of former FTC chief economist Willard Mueller that there was a separate demand for the trademark, that it was economically efficient and practicable to offer the trademark separately in the pole building industry in response to that demand, and that to a reasonable economic certainty the Morton trademark was in fact economically separate from the building materials Morton sold. The decision by the Court of Appeals discussed none of this evidence. Indeed, the Court of Appeals did not even mention Professor Mueller's opinion.

There is a problem with the Court of Appeals' understanding of *Jefferson Parish Hospital,* moreover, which is even deeper and more pervasive. This Court in *Jefferson Parish Hospital* did not purport to create a talismanic "separate-markets test" or any other magic "test" that would permit courts to dispense with the tedious chore of analyzing economic facts. This Court focused instead on the essential question of competitive impact:

> Of course, the Sherman Act does not prohibit "tying," it prohibits "contracts . . . in restraint of trade." Thus, in a sense the question whether this case involves "tying" is beside the point. The legality of

> petitioners' conduct depends on its competitive consequences, not whether it can be labeled "tying."

104 S.Ct. at 1563 n.34.

This Court went on to insist that:

> The definitional question depends on whether the arrangement may have the type of competitive consequences addressed by the rule. The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying—that petitioners have foreclosed competition on the merits in a product market distinct from the market for the tying item.

104 S.Ct. at 1563. The essential, anticompetitive vices of tying arrangements, this Court said, include the fact that they may be used covertly to transfer profit to the tied products, 104 S.Ct. at 1558-59 n.19, that they may permit enlargement of a legally granted monopoly, 104 S.Ct. at 1560, and that in general "they restrain competition on the merits by forcing purchases that would not otherwise be made." 104 S.Ct. at 1566.

In the case at bar, Walters' theory, which it amply supported with evidentiary submissions, was precisely that Morton had transferred the profitability inherent in its trademark to commonly available items such as nails, 2x4s and concrete mix, thereby foreclosing competition on the merits in the purchase of those items by Morton's dealers; and that by doing so Morton was able to put itself in a position not only to earn noncompetitive profits but to create for its dealers a squeeze between wholesale costs and resale prices which became an engine of predation. Morton used the tying restraint to raise its dealers' wholesale prices; the resale pricing restraint to keep its dealers from passing the higher costs on to their customers; and the

combination of the two to destroy its dealers as actual and potential competitors of Morton.

The Court of Appeals disregarded this evidence, as well as the entire dimension of the *Jefferson Parish Hospital* analytic approach to which this evidence related, because of a professed fear that recognizing Walters' tying claim would be equivalent to imposing "a regime of compulsory licensing of trademarks . . . ." Decision at 8 (737 F.2d at 704). The extravagance of this comment suggests the extent to which the Court of Appeals missed the point.

Walters has never claimed that the antitrust laws forbade Morton, if it wished to do so, to obtain any building components it thought appropriate by any means it found convenient; to package those components in any combination Morton thought best; and to sell the resulting, dissembled aggregation, at any price the market would bear, to any buyer who wished to buy it, as a "Morton Building". Walters has never contended that, had Morton chosen to proceed in this way, Section 1 would have granted Walters or anyone else the right to buy the Morton name without buying the package to which Morton chose to apply that name.

But that simply is not this case. Abundant evidence in the summary judgment record established that what Morton sold—directly and through its dealers—as a "Morton Building" was *not* the unconstructed aggregation of materials and components for which Morton charged the dealers, but the completed, standing, ready-to-use structure which the individual farmer bought and which the dealer built. It bears emphasis that the erection of a Morton Builuding was not a matter of assembling prefabricated parts from a kit, but a full-scale, on-site, ground-up construction job, performed by the dealer through use of raw materials supplied by Morton and obtained from other

sources and requiring 160 hours or more of labor.[4] This construction is not properly described as the mere assemblage of prefabricated walls, roof and floor; and the dealer's contribution to the final product was neither *de minimis* nor incidental. Indeed, Professor Mueller's analysis showed that the dealer contributed more to the value of the building than did Morton.

Morton, in other words, used the separate power of its mark to create a franchise system in which the end product —the Morton Building—was manufactured not by Morton alone but by Morton in conjunction with its independent dealers. These basic economic facts—facts which fundamentally distinguish the various analogies posited by the Court of Appeals and which directly bear upon the separateness of the mark in this case—were treated as irrelevant by the Court of Appeals.

This Court has never directly addressed the question of trademark tying, and thus has not had an opportunity to analyze the single-product issue in the context of a trademark tying case. For the reasons discussed above, petitioner believes that *Jefferson Parish Hospital's* empirical approach to the single-product issue applies with full force in the trademark tying context. The use of a trademark as the tying product adds a dimension to the single-product issue but, far from diminishing the importance of empirical analysis, as the approach taken by the Seventh Circuit here would suggest, that added dimension emphasizes the necessity of rigorously examining facts specific to the industry and to the economic relationships involved.

Recent Ninth Circuit decisions drawing on that court's seminal ruling in *Chicken Delight*, for example, underscore the key role played by such economic facts in analyzing

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[4] See Appendix.

trademark-related single product problems. *See, e.g., California Glazed Products, Inc.* v. *The Burns & Russell Company of Baltimore City,* 708 F.2d 1423 (9th Cir. 1983) (single product found where defendant limited trademark tie to glazing compound embodying secret and proprietary formulae, and did not attempt to extend it to commonly available masonry blocks); *Krehl* v. *Baskin-Robbins Ice Cream Co.,* 664 F.2d 1348 (9th Cir. 1981) (single product found where defendant limited trademark to ice cream made by secret recipes, and where plaintiff only distributed trademarked product and played no role in producing it).

The case at bar presents economic facts unlike any which have ever been dealt with in a published decision addressing the single-product issue in a trademark tying context. Professor Mueller analyzed those facts exhaustively in reaching his opinion that the Morton trademark functioned as a separate product. The Seventh Circuit's decision implicitly rejects this kind of empirical economic analysis and relies instead on doctrinally deduced rules of *per se* legality which make most of the economic facts irrelevant.

Morton consciously chose to exploit, in the distinctive way classically associated with franchise systems, the separate economic value that attached to the Morton trademark. It did not charge a separate fee for the use of the trademark—neither did the defendant in *Chicken Delight;* instead, it chose to extract the separate value of the mark through the prices it charged its franchisees for ordinary nails, common dimension lumber and other items that were as generic as the chicken, napkins and plastic knives and forks through which the *Chicken Delight* defendant illegally extracted profit from its trademark. It was this conscious, economic choice on Morton's part which brought into play Section 1's requirement that Morton impose only those restraints on competition which were reasonable under the circumstances.

II.

THE COURT OF APPEALS' REJECTION OF WALTERS' RESALE PRICE FIXING CLAIM REFLECTS THE SAME DOCTRINAL REDUTIONISM AS ITS REJECTION OF WALTERS' TYING CLAIM DOES.

Significantly, the Court of Appeals begins its analysis of Walters' resale price-fixing claim by expressing its doubt about the continuing validity of this Court's decision in *Albrecht* v. *Herald Company,* 390 U.S. 145 (1968). Decision at 11 (737 F.2d at 706). Unwilling to press its doubts about *Albrecht* to the point of overtly disregarding it, however, the Court of Appeals proceeds to dispose of Walters' claim by creating a heretofore unknown exception to the rule against vertical price fixing. Under that exception, vertical price fixing is legally unexceptionable as long as the prices fixed are maximum rather than minimum prices, and as long as they are fixed at levels which the manufacturer has specified in advertisements directed by it to ultimate consumers. Decision at 13-15 (737 F.2d at 707-708).

There is no authority for this departure from existing law, and it is impossible to defend it on the basis of logic or policy. A manufacturer certainly has a duty not to advertise falsely to consumers, about prices or anything else. Part and parcel of this duty, however, is the obligation not to make representations to consumers about matters—such as resale prices—which the manufacturer has no right to control. It would be a remarkable departure from prior antitrust learning to suggest that a manufacturer can make a representation to ultimate consumers about the conduct of independent, intermediate dealers of the manufacturer, and can then use that very representation as an excuse to impose corresponding restraints that would not otherwise be legally permitted.

The Court of Appeals further excused Morton's resale price-fixing on the ground that the injury caused to Walters by that price fixing was not the kind of injury that the antitrust laws are designed to prevent. Decision at 15-16 (737 F.2d at 708-709). This was the case, the court said, because the sanction by which Morton sought to enforce the fixed prices was the threat of price competition directed at those who exceeded them. *Id.* at 10 (737 F.2d at 709). Since the antitrust laws encourage price competition, the Court of Appeals reasoned, the threat of being damaged by such competition is not antitrust injury. *Id.*

This analysis reflects a basic lack of familiarity with the facts established in the summary judgment record. The evidence submitted by Walters indicated that Morton's occasional threats to sell directly in Walters' territory were neither the only nor the primary means of enforcing the maximum resale prices Morton fixed. Indeed, in Wisconsin, where Walters sold through several geographically dispersed sales offices, Morton had only one sales office, which served only the area within a 40-mile radius of it. The invidious aspect of Morton's price-fixing activity was precisely that, despite Morton's own inability to sell directly to Wisconsin customers outside a small area, it advertised the prices that it fixed in publications of state-wide circulation—that is, it used advertisements whose only purpose could have been to enhance its coercive, price-fixing effort.

Morton enforced its price-fixing regime with the classic tools of vertical price-fixers: threats of termination, manipulation of individual salesmen's commissions and wholesale discounts, and imposition of a pervasive regulatory regime. These facts do not fit in with the Court of Appeals' analysis, and no mention of them appears in the Court of Appeals' opinion.

The Court of Appeals acknowledged that, "... Walters' affidavits if true indicate that Morton went beyond simply announcing its [price] policy and terminating non-compliers, and used persuasion and policing to obtain that compliance ...." Decision at 13 (737 F.2d at 707). The exception which the Court of Appeals invented in order to permit Morton to avoid the legal consequences of that conduct is indefensible by reference to *Albrecht* and the rule against vertical price-fixing in general.

III.

THE COURT OF APPEALS LIKEWISE ERRED IN REJECTING WALTERS' AGGREGATION OF RESTRAINTS CLAIM.

Walters alleged that Morton imposed a complex aggregation of vertical restraints, including but not limited to the tying, territorial and pricing restraints mentioned above; that Morton enforced these restraints by combining with other parties, *e.g.*, by procuring the agreement of independent building component suppliers not to sell to Walters in violation of Morton's policy; and that when Morton decided to eliminate its independent dealers, it did not simply and straightforwardly terminate them, but used this package of restraints to strangle them over time, so that they would represent no threat to enter the pole building market as competitors of Morton after their termination. The evidence submitted by Walters showed that Walters was the only one of Morton's independent dealers to survive this process, and that only Walters was able after termination of its dealership to challenge Morton in the pole building industry.

Walters, in short, alleged conduct directly analogous to that condemned in *Coleman Motor Company* v. *Chrysler Corporation*, 525 F.2d 1338 (3rd Cir. 1975), and in similar

cases. *See, e.g., Photovest Corporation* v. *Fotomat Corporation,* 606 F.2d 704, 726 (7th Cir. 1979), *cert. denied,* 445 U.S. 917 (1980); *Industrial Building Materials, Inc.* v. *Interchemical Corp.,* 437 F.2d 1336 (9th Cir. 1970).

The Court of Appeals here distinguished *Coleman Motor Company* on the ground that that case had involved claims of predatory pricing, whereas the present case does not. Decision at 18 (737 F.2d at 710). The Court of Appeals then held that Walters' aggregation of restraints claim must be rejected because neither the means employed by Morton—refusing to license its trademark separately and imposing vertical restraints on maximum prices—nor the end Morton sought to achieve—vertical integration—were unlawful. Decision at 18-19 (737 F.2d at 710).[5]

This analysis is fundamentally misguided. Whether or not Morton's vertically-imposed tying or price-fixing restraints were independently unlawful, it is elementary that horizontal collusion with alternative suppliers in order to enforce those restraints is objectionable on antitrust grounds. And, as noted, the territorial restraints which were part and parcel of the Morton System concededly raise triable issues of antitrust legality.

The Court of Appeals' legal absolution of the means employed by Morton makes no sense unless the Court meant to say that every mechanism employed in aid of a system of restraints must be an independent antitrust violation in order for the aggregation as a whole to be a violation. The law is in fact precisely the opposite: the whole is greater than the sum of its parts, not less, and an aggre-

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[5] The Court of Appeals conceded that the territorial restraints might be unlawful, *id.* at 18 (737 F.2d at 710), but asserted without explanation that whatever damages Walters can obtain at trial for those restraints will compensate Walters for the injury it has suffered as a result of the predatory aggregation as a whole. *Id.*

gation of vertical restraints can violate Section 1 even if none of the restraints, taken in isolation, would do so, where it can be shown, as here it was, that the purpose of that aggregation of restraints was the destruction of a potentially competitive enterprise. *See Ohio-Sealy Mattress Manufacturing Company* v. *Sealy, Inc.*, 585 F.2d 821, 827 (7th Cir. 1978).

The Court of Appeals' endorsement of the ultimate objective of Morton's anticompetitive combinations is equally puzzling. To be sure, there is nothing illegal about vertical integration. It goes to the heart of antitrust concerns, however, to integrate vertically by supplanting independent dealers in such a way as consciously to destroy the ability of those independent dealers to re-enter the market in competition with the vertically integrated entity. That is the very anticompetitive vice identified by *Coleman Motor Company*. The Court of Appeals does not explain, and Walters cannot imagine, why this objective is less invidious from an antitrust standpoint because it is accomplished by means of predatory tying, collusive refusals to deal, and restraints on territories and resale prices, than it would be if it were accomplished by means of predatory pricing.

In the case at bar, the Seventh Circuit has expressly approved the conscious and systematic destruction of Walters as a Morton dealer through the use of a combination of wholesale and retail restraints of trade, enforced by coercion and threats, which prevented Walters from competing in either the wholesale market or the retail market. The decision stands for the dogmatic proposition that Section 1 of the Sherman Act cannot reach restraints which, however injuriously, facilitate what the court here viewed as the economically desirable end of vertical integration.

No decision of this Court has ever suggested, much less approved, such an analysis or made such a policy choice. The Seventh Circuit's opinion here attempts to return to the sterile formalism and barren search for mechanical "rules" and "tests" which this Court rejected in *Continental TV* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). If such a policy choice is to be made, entailing as it does such a radical departure from this Court's previous decisions, it is this Court which should make it.

CONCLUSION

This Court proclaimed in *Jefferson Parish Hospital* that, "[I]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" 104 S.Ct. at 1556. A conflicting view advocated by Judge Posner before he ascended the bench, however, that "[t]he prohibition against tie-ins ought to be radically curtailed. . . ." and that the complete abolition of the rule against tie-ins would be "utopian", has prevailed in the Court of Appeals' decision. *See* R. Posner, ANTITRUST LAW — AN ECONOMIC PERSPECTIVE 182-83 (1976). In the case at bar, without full analysis of the economic facts of record, the Court of Appeals has invented *per se* rules of legality to shield from antitrust scrutiny purchasing and other restraints which were employed predatorily to destroy independent enterprises. The Court of Appeals has sanctioned use of the summary judgment procedure to conjure away factual disputes that were doctrinally inconvenient. Procedural compromise has led to substantive error.

For the reasons outlined in this petition, petitioner respectfully prays that this Court issue a writ of certiorari

to the United States Court of Appeals for the Seventh Circuit for the purpose of reviewing the decision of that court in the case herein.

Dated this 13 day of September, 1984.

Respectfully submitted,

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